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21 Oct 2016

Minister Michael Masutha on the matter of International Criminal Court and Sudanese President Omar Al Bashir

We have called this press conference to announce the decision taken by Cabinet on Wednesday, 19 October 2016 in relation to the country's membership to the Rome Statute of the International Criminal Court and the pending appeal regarding Sudanese President Al Bashir.

The Republic of South Africa is a founder member of the African Union and plays an important role in resolving conflicts on the African continent and in encouraging the peaceful resolution of conflicts wherever they occur anywhere else in the world.

In exercising its international relations with foreign countries, particularly with countries in which serious conflicts occur or have occurred, South Africa is hindered by the Implementation of the Rome Statute of the International Criminal Court Act, 2 (Act No 27 of 2002). This Act and the Rome Statute of the International Criminal Court compel South Africa to arrest persons who may enjoy diplomatic immunity under customary international law but who are wanted by the International Criminal Court for genocide, crimes against humanity and war crimes and to surrender such persons to the International Criminal Court. South Africa has to do so, even under circumstances where we are actively involved in promoting peace, stability and dialogue in those countries.

We wish to give effect to the rule of customary international law which recognises the diplomatic immunity of heads of state and others in order to effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur, particularly on the African continent. South Africa enacted the Diplomatic Immunities and Privileges Act, (Act No. 37 of 2001), which provides for the immunities and privileges of diplomatic missions and consular posts and their members, of heads of states, special envoys and certain representatives of the United Nations and its specialised agencies, other international organisations and certain other persons.

However, the Implementation of the Rome Statute of the International Criminal Court Act, 2002, is in conflict and inconsistent with the provisions of the Diplomatic Immunities and Privileges Act, 2001. In order to ensure South Africa's continued ability to conduct active diplomatic relations, a bill proposing the repeal of the Implementation of the Rome Statute of the International Criminal Court Act, 2002 will soon be tabled in parliament. We have already in writing informed the Speaker of the National Assembly and the Chairperson of the NCOP of this Executive decision.

In the matter of the Minister of Justice and Constitutional Development v The Southern African Litigation Centre (867/15) [2016] ZASCA 17 (15 March 2016), the Supreme Court of Appeal confirmed that in terms of customary international law, heads of state enjoy immunity against arrest. However, the Supreme Court of Appeal found that in enacting the Implementation of the Rome Statute of the International Criminal Court Act, 2002, South Africa had expressly waived the immunity of such heads of state and that South Africa was obliged to arrest persons wanted for crimes committed against humanity.

In essence, the Supreme Court of Appeal identified the problem which needs to be addressed. The effect of withdrawal from the Rome Statute as well as the repeal of the Implementation Act thus completes the removal of all legal impediments inhibiting South Africa's ability to honour its obligations relating to the granting of diplomatic immunity under international law as provided for under our domestic legislation. This therefore removes the necessity at least in so far as this aspect is concerned of continuing with the appeal.

Written notice to withdraw from the Rome Statute of the International Criminal Court has been submitted to the Secretary-General of the United Nations in accordance with Article 127 (1) of the Rome Statute of the International Criminal Court. The withdrawal will take effect one year after the Secretary-General has received the notification. South African will remain obliged under the Rome Statute for the duration of the 12 months' notice period.

An application for leave to appeal the decision of the Supreme Court of Appeal set down for hearing at the Constitutional Court on 22 November 2016, will now be withdrawn. This is so, especially as the Supreme Court of Appeal has removed the uncertainty around customary international law in relation to diplomatic immunity in so far as it affects heads of states and others who may be wanted for serious violations of human rights and other serious crimes but who enjoy diplomatic immunity under international customary law.

South Africa remains committed to the fight against impunity and to hold those who have committed crimes against humanity and other serious crimes accountable. Our unwavering commitment to the promotion and protection of human rights throughout Africa and elsewhere in the world is further demonstrated by our continued participation in various international and continental human rights instruments.

For this reason, South Africa will work closely with the African Union and with other countries in Africa to strengthen continental bodies, such as the African Court on Human and People's Rights, created to deal with such crimes and to prosecute the perpetrators, whilst at the same time continuing to participate and honour its commitments under international human rights instruments. South Africa will continue to actively promote dialogue and the peaceful resolution of conflicts on the African continent and elsewhere.

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